

1 HONORABLE RICHARD A. JONES
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 COSTCO WHOLESALE CORPORATION,

11 Plaintiff,

12 v.

13 AU OPTRONICS CORPORATION, et al.,

Defendants.

CASE NO. C13-1207RAJ

ORDER

14 **I. INTRODUCTION**

15 This matter comes before the Court on the Defendants LG Display Co., Inc. and
16 LG Display America, Inc. and AU Optronics Corporation and AU Optronics Corporation
17 America's (collectively, "Defendants") Combined Motions for Judgment as a Matter of
18 Law, in the Alternative, New Trial, and Amendment of the Findings in Bench Trial. Dkt.
19 # 689. Although Defendants have requested oral argument, the Court finds that oral
20 argument is unnecessary. For the reasons set forth below, the Court **DENIES**
21 Defendants' Motions.

22 **II. BACKGROUND**

23 In brief, this case concerns Plaintiff Costco Wholesale Corporation's ("Plaintiff")
24 claims regarding a conspiracy spanning nearly a decade to fix the prices for thin-film
25 transistor liquid crystal display panels (or "TFT-LCD panels"). Plaintiff, more
26 specifically, claims that it paid too much for finished products that incorporated the price-
27 fixed panels. Following a lengthy jury trial, judgment was entered in favor of Plaintiff

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1 and against Defendants for \$61,971,040 based on the jury’s verdict and this Court’s
2 findings of fact and conclusions of law. *See* Dkt. # 682. These motions follow.

3 **III. LEGAL STANDARD**

4 a. Motion for Judgment as a Matter of Law

5 Federal Rule of Civil Procedure 50(b) permits a party to renew a motion for
6 judgment as a matter of law previously raised under Rule 50(a) before the case was
7 submitted to a jury. *See E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th
8 Cir. 2009). “A party cannot raise arguments in its post-trial motion for judgment as a
9 matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion.”
10 *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003) (citing Fed. R. Civ. P.
11 50 advisory committee note to 1991 amendment).

12 In ruling on a motion for judgment as a matter of law, a court may not make
13 credibility determinations or weigh the evidence and must draw all reasonable inferences
14 in favor of the nonmoving party. *See Josephs v. Pac. Bell*, 443 F.3d 1050, 1062 (9th Cir.
15 2005) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149-50 (2000)).
16 Rule 50 permits a court to grant judgment as a matter of law “when the evidence permits
17 only one reasonable conclusion and the conclusion is contrary to that reached by the
18 jury.” *Ostad v. Or. Health Servs. Univ.*, 327 F.3d 876, 881 (9th Cir. 2003) (citing
19 *Monroe v. City of Phx.*, 248 F.3d 851, 861 (9th Cir. 2001)).

20 A court reviews “a jury’s verdict for substantial evidence in ruling on a properly
21 made motion under Rule 50(b).” *Go Daddy Software*, 581 F.3d at 961 (citing *Janes v.*
22 *Wal-Mart Stores, Inc.*, 279 F.3d 883, 888 (9th Cir. 2002)). In other words, a court must
23 sustain a jury verdict so long as there is “evidence adequate to support the jury’s
24 conclusion, even if it is also possible to draw a contrary conclusion.” *See Harper v. City*
25 *of L.A.*, 533 F.3d 1010, 1021 (9th Cir. 2008) (quoting *Pavao v. Pagay*, 307 F.3d 915, 918
26 (9th Cir. 2002)) (internal quotation marks omitted). In contrast, a court reviewing a Rule
27 50(b) motion “based on grounds not previously asserted in a Rule 50(a) motion” is

1 “limited to reviewing the jury’s verdict for plain error.” *Go Daddy Software*, 581 F.3d at
2 961 (quoting *Janes*, 279 F.3d at 888; citing *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*,
3 259 F.3d 1101, 1109 (9th Cir. 2001)).

4 b. Motion for New Trial

5 Federal Rule of Civil Procedure 59(a) provides that a “court may, on motion, grant
6 a new trial on all or some of the issues . . . after a jury trial, for any reason for which a
7 new trial has heretofore been granted in an action at law in federal court.” Fed. R. Civ. P.
8 59(a).

9 Because “Rule 59 does not specify the grounds on which a motion for a new trial
10 may be granted,” courts are “bound by those grounds that have been historically
11 recognized.” *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir. 2003).
12 Included among these historically recognized grounds are claims “that the verdict is
13 against the weight of the evidence, that the damages are excessive, or that, for other
14 reasons, the trial was not fair to the party moving.” *Molski v. M.J. Cable, Inc.*, 481 F.3d
15 724, 729 (9th Cir. 2007) (quoting *Montgomery Ward & Co v. Duncan*, 311 U.S. 243, 251
16 (1940)). Ordinarily, a “trial court may grant a new trial only if the verdict is contrary to
17 the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent
18 a miscarriage of justice.” *Id.* (quoting *Passantino v. Johnson & Johnson Consumer*
19 *Prods.*, 212 F.3d 493, 510 n.15 (9th Cir. 2000)).

20 c. Motion for Amendment

21 Federal Rule of Civil Procedure 52(b) permits a court to “amend its findings--or
22 make additional findings” and to correspondingly amend the judgment on a party’s
23 motion filed no later than 28 days after the entry of judgment. “Motions under Rule
24 52(b) are primarily designed to correct findings of fact which are central to the ultimate
25 decision; the Rule is not intended to serve as a vehicle for a rehearing.” *Crane-McNab v.*
26 *Cty. of Merced*, 773 F. Supp. 2d 861, 873 (E.D. Cal. 2011) (citing *Davis v. Mathews*, 450
27 F. Supp. 308, 318 (E.D. Cal. 1978)). Such motions are only “granted in order to correct

1 manifest errors of law or fact or to address newly discovered evidence or controlling case
2 law.” *Perez v. State Farm Mut. Auto. Ins. Co.*, 291 F.R.D. 425, 431 (N.D. Cal. 2013)
3 (quoting *ATS Prods. Inc. v. Ghiorso*, No. 10-4880, 2012 WL 1067547, at *1 (N.D. Cal.
4 Mar. 28, 2012)).

5 **IV. ANALYSIS**

6 a. Proof of Plaintiff’s Antitrust Injury

7 Defendants begin by arguing that Plaintiff has not shown that it suffered an injury
8 as a result of their conduct. *See* Dkt. # 689 at 12. Defendants argue that the evidence
9 Plaintiff presented at trial was insufficient to show that Plaintiff actually paid any
10 overcharges. *See id.*

11 The Ninth Circuit has held that the rule “in seeking damages for loss of profits in
12 antitrust cases is that the plaintiff is required to establish with reasonable probability the
13 existence of some causal connection between defendant’s wrongful act and some loss of
14 anticipated revenue.” *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 392 (9th Cir. 1957). In
15 other words, “[t]o recover treble damages, plaintiffs must prove actual causation—‘injury
16 in fact.’” *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*,
17 691 F.2d 1335, 1341 n.7 (9th Cir. 1982) (citing *id.*).

18 Defendants argue that Plaintiff was required to establish with “certainty that LCD
19 panels manufactured by Defendants or co-conspirators were incorporated into the
20 finished products” that Plaintiff purchased. *See* Dkt. # 689 at 13. They argue,
21 essentially, that Plaintiff presented only generalized evidence of increases in finished
22 product prices and improperly relied on Dr. Douglas Bernheim’s model. *See id.*
23 Plaintiff, for its part, properly characterizes Defendants’ proposed standard as requiring
24 proof of “panel-by-panel impact.” *See* Dkt. # 695 at 11 (quoting MDL Dkt. # 4848 at 5).

25 Defendants propose too strong of a rule in considering antitrust injury. Far from
26 requiring “certainty,” courts have held that “[t]o demonstrate injury in fact, it is
27 ‘generally sufficient to show with reasonable probability some causal connection between
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1 the antitrust violation and [plaintiff's alleged injury].'" *Sun Microsystems Inc. v. Hynix*
2 *Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1195 (N.D. Cal. 2009) (quoting *Nw. Publ'ns,*
3 *Inc. v. Crumb*, 752 F.2d 473, 476 (9th Cir. 1985)). To be sure, “[i]n antitrust cases, a
4 lesser level of proof is needed to support the amount of damages than to support the fact
5 of antitrust injury.” *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*,
6 791 F.2d 1356, 1360 (9th Cir. 1986) (quoting *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d
7 1282, 1297 (9th Cir. 1984)). But that does not mean that such evidence cannot be shown
8 through circumstantial evidence and inference. *See Sun Microsystems*, 608 F. Supp. 2d at
9 1197 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969));
10 *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1051 (9th
11 Cir. 1981)). In fact, this Court – and the MDL court – has essentially held as much. *See*
12 Dkt. # 681 at 8-9 (concluding “that the MDL court’s rulings relieve Costco of any burden
13 to prove its standing panel-by-panel”).

14 With this in mind, the Court finds that the evidence sufficiently supports the jury’s
15 verdict and that much of this evidence is not specifically tied to Dr. Bernheim’s
16 regression model. To begin, this Court has already found sufficient evidence showing
17 that Plaintiff purchased products containing price-fixed panels. *See* Dkt. # 681 at 9.
18 Plaintiff presented substantial evidence showing sales of price-fixed panels from
19 conspirators to Plaintiff’s vendors. *See e.g.*, Trial Ex. 51, 80, 81, 103, 104, 110, 114, 118,
20 5613 (Defendants’ exhibit showing distribution chain). Multiple witnesses testified to the
21 same effect. *See e.g.*, Trial Tr. Oct. 1, 2014 [Do Hoi Koo Test.] 1080:16-24; Trial Tr.
22 Oct. 16, 2014 [Masahiro Yakota Test.] 2752:24-2753:7. Plaintiff’s evidence suffices to
23 show that it purchased products containing price-fixed panels.

24 Furthermore, Plaintiff presented sufficient evidence to show that increases in panel
25 prices were passed through. For one, several witnesses acknowledged monitoring and
26 sharing information regarding finished product demand and pricing. *See* Trial Tr. Oct. 8,
27 2014 [Soo Chul Park Test.] 1883:15-19; Trial Tr. Oct. 9, 2014 [Yul Rak Sohn Test.]

1 2085:22-2087:8. Plaintiff also presented evidence showing that the relationship between
2 panel price and finished product prices was well understood. *See* Trial Ex. 221, 239, 318,
3 398. Furthermore, there was evidence showing that the conspirators supplied information
4 regarding their views on the market for finished products with each other. *See* Trial Tr.
5 Sept. 30, 2014 [Makoto Chiba Test.] 928:1-929:15.

6 Plaintiff also presented evidence showing that a large portion of the price of the
7 products it purchased was attributable to the price-fixed panels. *See e.g.*, Trial Tr. Oct. 6,
8 2014 [Geoff Shavey Test.] 1403:15-21; Trial Tr. Oct. 20, 2014 [Douglas Bernheim Test.]
9 2992:4-2993:19; *see also* Trial Tr. Oct. 16, 2014 [Dean Snyder Test.] 2613:7-16. In fact,
10 there was substantial evidence that the prices of finished products is closely tied to that of
11 panels. *See e.g.*, Trial Tr. Sept. 24, 2014 [Douglas Bernheim Test.] 443:11-445:5.

12 This evidence was sufficient to show that Plaintiff suffered antitrust injury as a
13 result of Defendants' wrongdoing. Moreover, contrary to Defendants' assertions, this
14 was not evidence merely generalized to the industry as a whole. Dr. Bernheim himself
15 testified that he based his analysis, in part, on tracing where panels came from for
16 particular products that Plaintiff purchased. *See* Trial Tr. Sept. 24, 2014 [Douglas
17 Bernheim Test.] 558:1-559:1. On this record, the jury could have found that it was more
18 likely than not that Plaintiff was injured as a result of the Defendants' conduct.

19 Because the Court finds that Plaintiff met its burden on this element, it declines to
20 address the Parties' arguments regarding judicial estoppel.

21 b. Proof of Plaintiff's Antitrust Standing

22 Next, Defendants argue that Plaintiff did not establish that it had standing to
23 recover under *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*,
24 459 U.S. 519 (1983) ("AGC"). Of course, this Court and the MLD Court have already
25 held that Plaintiff had standing to pursue its antitrust claims. *See* Dkt. # 681 at 10; MDL
26 Dkt. # 6931 at 3-4; MDL Dkt. # 9144 at 3-4. And, contrary to Defendants' argument,
27 this Court's ruling was not made in response to a defense summary judgment motion, but
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1 on evidence adduced at trial. *See* Dkt. # 681. This Court’s ruling in large part was based
2 on its finding that Plaintiff purchased products containing price-fixed LCD panels. *See*
3 *id.* at 11.

4 As discussed, *supra*, Plaintiff introduced evidence demonstrating that it purchased
5 products containing price-fixed panels from the members of the price-fixing conspiracy.
6 *See also id.* at 11. Furthermore, as mentioned above, Plaintiff also presented evidence
7 establishing that a significant portion of the price of finished products was related to the
8 price of the price-fixed panels. This evidence suffices to establish Plaintiff’s standing, as
9 it shows that the market for LCD products and LCD panels was inextricably linked. This
10 formulation of AGC antitrust standing is well established. *See Dang v. San Francisco*
11 *Forty Niners*, 964 F. Supp. 2d 1097, 1112-13 (N.D. Cal. 2013) (collecting cases and
12 finding that anti competitive effect on market for licensing of sports team logos and
13 trademarks necessarily would affect consumer retail market for apparel bearing these
14 logos and trademarks).

15 c. The Foreign Trade Antitrust Improvements Act (“FTAIA”)

16 Defendants next argue that no reasonable jury could have found that Plaintiff’s
17 claims were permitted under the FTAIA. *See* Dkt. # 689 at 22.

18 The FTAIA “lays down a general rule placing *all* (nonimport) activity involving
19 foreign commerce outside the Sherman Act’s reach.” *F. Hoffman-La Roche Ltd. v.*
20 *Empagran S.A.*, 542 U.S. 155, 162 (2004). However, the FTAIA “brings such conduct
21 back within the Sherman Act’s reach” if “the conduct *both* (1) sufficiently affects
22 American commerce . . . and (2) has an effect of a kind that antitrust law considers
23 harmful.” *Id.* (quoting 15 U.S.C. §§ 6a(1) & (2)). Furthermore, “[u]nder its plain terms,
24 the FTAIA does not affect import trade.” *United States v. Hsiung* (“*Hsiung II*”), 778
25 F.3d 738, 754 (9th Cir. 2014) (citing *id.*; *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 299
26 F.3d 281, 287 (9th Cir. 2002)). In short, the FTAIA does not affect the Sherman Act’s
27 coverage of import trade or commerce and excludes nonimport trade or commerce with
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1 foreign nations unless the domestic effect exception is met. *See Fenerjian v. Nongshim*
2 *Co., Ltd.*, 72 F. Supp. 3d 1058, 1080 n.30 (quoting *United States v. Hsiung* (“*Hsiung I*”),
3 758 F.3d 1074, 1086 (9th Cir. 2014)).

4 The Court instructed the jury that the Sherman Act applied if “[s]ales of LCD
5 panels whose prices were fixed by the conspiracy or finished products containing LCD
6 panels whose prices were fixed by the conspiracy . . . were sold in a transaction between
7 a member of the conspiracy and a customer in the United States.” Dkt. # 622 at 30.
8 Defendants contend that the jury could not reasonably have found this to be the case
9 because vendors from whom Plaintiff ultimately purchased the finished products were
10 separate from the conspirators identified in the verdict. *See* Dkt. # 689 at 23. As Plaintiff
11 correctly notes, however, the instruction permitted the jury to find that the import
12 commerce exception was met based on evidence that conspirators sold their panels or
13 finished products for resale to Plaintiff in the United States. Indeed, some witnesses
14 testified that vendors would purchase finished products from conspirators to specifically
15 be resold to American customers. *See e.g.*, Trial Tr. Oct. 16, 2014 [Masahiro Yakota
16 Test.] 2751:10-2753:7. Indeed, Plaintiff’s theory falls well within an accepted theory of
17 the FTAIA import commerce exclusion. Although the Ninth Circuit declined to address
18 the “outer bounds of import trade” in *Hsiung II*, it nevertheless acknowledged that it
19 could include defendants whose conduct was merely *directed* at an American import
20 market. *See Hsiung II*, 778 F.3d at 755 n.8 (citing *Animal Sci. Prods., Inc. v. China*
21 *Minmetals Corp.*, 654 F.3d 462, 471 n.11 (3d Cir. 2011)).

22 Whatever the case, even if the import commerce exclusion did not apply, Plaintiff
23 presented sufficient evidence to show that the domestic effects exception was satisfied.
24 Much of Defendants’ argument on this point simply repeats its theory that Plaintiff was
25 required to show specific, panel-by-panel impact. As discussed, *supra*, this Court and the
26 MLD Court have repeatedly rejected such a stringent level of proof.
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1 This Court instructed the jury that they could find that the domestic effect
2 exception was met if “[t]he panels or products were sold by a member of the conspiracy
3 outside the United States to a customer outside the United States, and the sale had a
4 direct, substantial, and reasonably foreseeable effect on later sales to a customer in the
5 United States.” *See* Dkt. # 622 at 30. Furthermore, for an effect to be “direct,” the Court
6 instructed that it must have an “immediate impact on the later sales.” *See id.* The jury’s
7 finding on this point was well established by the same evidence showing that that the
8 prices Plaintiff paid were directly affected by the conspirators’ conduct – i.e., the
9 evidence showing that Plaintiff suffered antitrust injury.

10 The Ninth Circuit’s holding in *Hsiung II* simply reinforces this point. The court
11 there addressed substantially the same conspiracy at issue in this case – manufacturers of
12 TFT-LCD panels conspired to set and stabilize their prices. *See Hsiung II*, 778 F.3d at
13 743. The court found that sufficient evidence was presented to satisfy the domestic
14 effects exception. *See id.* at 759. The court noted that the evidence showed that “TFT–
15 LCDs are a substantial cost component of the finished products.” *Id.* Witnesses testified
16 as to the correlation between panel cost and finished product prices. *Id.* Furthermore, the
17 evidence established that “[i]t was well understood that substantial numbers of finished
18 products were destined for the United States and that the practical upshot of the
19 conspiracy would be and was increased prices to customers in the United States.” *Id.*
20 This “constellation of events that surrounded the conspiracy [led] to one conclusion—the
21 impact on the United States market was direct and followed ‘as an immediate
22 consequence’ of the price fixing.” *Id.* Plaintiff presented substantially the same evidence
23 in the instant case, as this Court has already outlined above.

24 Defendants now assert that in order to meet the “gives rise to” prong of the
25 domestic effects exception, Plaintiff must specifically show that its specific injury arose
26 from the domestic effect of which it complains. *See* Dkt. # 696 at 18. But *Motorola*
27 *Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015), which Defendants
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1 cite, dealt with a decidedly different scenario than that here. In *Motorola*, the court found
2 that the effect of anticompetitive conduct on domestic U.S. commerce did not give rise to
3 an antitrust cause of action because “the immediate victims of the price fixing were
4 [Motorola’s] *foreign subsidiaries*.” *See id.* at 819-20 (emphasis added). The court
5 stressed that “Motorola’s subsidiaries are governed by the laws of the countries in which
6 they are incorporated and operate.” *See id.* at 820. Because Motorola and its foreign
7 subsidiaries were treated as separate entities for other purposes, the court reasoned that
8 they should be similarly treated in applying the FTAIA. *See id.* As such, there was no
9 domestic effect – the harm was suffered in the foreign subsidiaries’ countries. *See id.*

10 But Plaintiff did not make its purchases through foreign subsidiaries as Motorola
11 did. It purchased the finished products from U.S. vendors who, in turn, purchased from
12 conspirators. The domestic effect – the increased prices as a result of the cartel’s price
13 fixing – was felt by Plaintiff entirely in the U.S. Additionally, the increased prices that
14 Plaintiff paid for the products containing fixed-price panels was, of course, specific to
15 Plaintiff. The domestic effects exception was satisfied.

16 Finally, Defendants urge this Court to find that Plaintiff’s claim does not survive
17 under Washington’s Consumer Protection Act (“CPA”). *See* Dkt. # 696 at 18. Given
18 that the Court has already found that Plaintiff’s claims survive application of the FTAIA,
19 it is functionally irrelevant whether the CPA incorporates those same limitations, though
20 Defendants have provided some authority suggesting that it does. *See In re Optical Disk*
21 *Drive Antitrust Litig.*, No. 3:10-MD-2143 RS, 2014 WL 3378336, at *3 (N.D. Cal. July
22 10, 2014); *cf. Ass’n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 706
23 (9th Cir. 2001) (citing RCW § 19.86.920) (“Washington courts are directed to interpret
24 the CPA in light of federal court decisions interpreting federal antitrust law”).

25 d. Plaintiff’s Burden of Proving Antitrust Impact

26 Defendants next argue that Plaintiff’s burden in showing antitrust injury, antitrust
27 standing, and domestic effect was not lessened by the Ninth Circuit’s holding in *Royal*

1 *Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 327 (9th Cir. 1980). See Dkt. # 689
2 at 25. Essentially, Defendants contend that Plaintiff was required to present upstream
3 pass-on evidence showing that the inflated prices for the fixed-price panels was directly
4 traceable to the prices Plaintiff paid for the finished products. See Dkt. # 696 at 20.

5 As this Court has previously ruled, such evidence is ordinarily not permitted
6 pursuant to *Royal Printing* because permitting it “would ‘involve all of the evidentiary
7 and economic complexities’ that the Supreme Court ‘clearly forbade’ in *Illinois Brick Co.*
8 v. *Illinois*, 431 U.S. 720 (1977).” See Dkt. # 569 at 3. This was because *Illinois Brick*
9 foreclosed both offensive and defensive use of such pass-on theories by imposing a direct
10 purchaser rule that eliminated the problems associated with apportioning overcharges
11 between direct and indirect purchasers. See 431 U.S. at 728, 731-33.

12 First, Defendants urge that the Court should have required Plaintiff to show such
13 upstream pass-on evidence because the instant case involved components rather than
14 finished products. See Dkt. # 689 at 26-28. To this end, Defendants cite *In re ATM Fee*
15 *Antitrust Litig.*, 686 F.3d 741 (9th Cir. 2012), arguing that the Ninth Circuit changed the
16 rule set forth in *Royal Printing*. See Dkt. # 689 at 27. But Defendants read too much into
17 *ATM Fee* – the court there did not modify the *Royal Printing* rule. Rather, the *ATM Fee*
18 court mentioned “pass on” just two times, each time simply repeating the plaintiffs’
19 allegations. See 686 F.3d at 750, 753. There is simply no indication that *ATM Fee*
20 changed *Royal Printing*’s standard. To the contrary, *ATM Fee* affirms *Royal Printing*’s
21 holding that indirect purchasers may sue when a conspiring seller owns or controls the
22 direct purchaser. See *id.* at 749.

23 Next, Defendants contend that *Royal Printing*’s rule does not extend to *AGC*’s
24 standing requirements or to the FTAIA’s exceptions. See Dkt. # 689 at 28-29.
25 Consequently, Defendants contend that Plaintiff was required to adduce upstream pass-on
26 evidence to show these requirements. See *id.* Simply put, Defendants argue that Plaintiff
27 was put to a more stringent burden of proof on antitrust standing under *AGC* and to show
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1 that Plaintiff's claim fell within the exceptions to the FTAIA. Of course, Defendants do
2 not cite any authority actually standing for requiring separate standards for these
3 elements. This Court sees no reason to do so. *AGC* established a multi-factor test for
4 determining whether a given plaintiff was a proper party to bring a private antitrust
5 action. *See* 459 U.S. at 535, 537-44 & n.1. And the Court in *AGC* was well aware of the
6 standard set forth in *Illinois Brick* and expressly stated that “[t]he same concerns” guided
7 its holding governing standing. *See AGC*, 459 U.S. at 544. There seems little reason,
8 then, that different burdens of proof should apply to *Illinois Brick*'s ownership/control
9 rule and to *AGC*'s standard for antitrust standing. Likewise, this Court finds no reason to
10 deviate from the *Illinois Brick* standard in evaluating whether a party's claims fall within
11 the exceptions to the FTAIA.

12 e. Sufficiency of the Evidence Regarding Philips and Panasonic

13 Next, Defendants argue that the jury could not have reasonably found that Philips
14 or Panasonic participated in the conspiracy. Dkt. # 689 at 30. Defendants thus argue that
15 the Court should reduce the jury's award by approximately \$11.7 million prior to
16 trebling. *Id.* The Court disagrees. There was sufficient evidence for the jury to find that
17 Philips and Panasonic participated in the conspiracy.

18 With respect to Philips, Plaintiff presented evidence showing that Philips was
19 exchanging confidential information regarding panels.¹ Several internal Epson
20 documents reflect communications with Philips in October and November 2004
21 discussing price and future production information. *See e.g.*, Trial Ex. 924 (“With
22 Amazon, the supply schedule is being moved up from January to December. 500k/month.

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25 ¹ Defendants argue that it was undisputed that Philips never attended a Crystal Meeting. *See*
26 Dkt. # 689 at 30. That is true, but Defendants' expert admitted that physical presence was not
27 necessary to be part of a conspiracy. *See* Trial Tr. Oct. 15, 2014 [Dennis Carlton Test.] 2399:16-
4114 SI, 2013 WL 3387652, at *1 (N.D. Cal. July 8, 2013).

1 Q4: \$18.75 Q1:\$17.75").² Additional documents reflect communications between other
2 conspirators and Philips regarding TFT-LCD panels. *See* Trial Exs. 788 (discussing
3 panel shortages and production and demand forecasts); 914 at 2 (explaining that “[p]rice
4 requests from (Ph) for cell sales have become severe” and attaching an email explaining a
5 meeting to discussing methods of reducing “TFT cell costs”); 936 at 3 (discussing
6 “Active” panel quantities); 1056 at 1 (explaining that “Active LCDs” included TFTs).
7 Indeed, as Plaintiff points out, much of this evidence establishes opportunity, method,
8 and actual exchanges of information about non-STN panels. Finally, to the extent that
9 Defendants contend that these exhibits merely show permissible buyer-seller exchanges,
10 the Court disagrees. Many of these documents show impermissible price-fixing – and the
11 jury could well conclude that the referenced discussions with Philips were part of the
12 same scheme.

13 Likewise, the evidence supports the jury’s finding that Panasonic was a
14 conspirator. For one, numerous witnesses (including those who testified to early
15 meetings and exchanges of confidential price information) testified to meeting with
16 Panasonic. *See e.g.*, Trial Tr. Sept. 25, 2014 [Genichi Watanabe Test.] 715:11-18; Trial
17 Tr. Oct. 1, 2014 [C.C. Liu Test.] 1107:8-13, 1108:7-25, 1111:6-10, 1133:4-11 (“Q: You
18 weren’t concerned about [Panasonic’s] pricing, were you? A: We tried to learn from
19 them.”). Other documents indicate that representatives of Panasonic may have met with
20 representatives of other conspirators after 2001. *See e.g.*, Trial Exs. 979; 1024.
21 Additionally, other documents reflect that conspirators had learned Panasonic’s
22 willingness to abandon its supply of 15 inch panels to “Viewsonics” if the price dropped
23 below \$220. *See* Trial Ex. 99. Given the contents of that communication, the jury could
24 well have inferred that a representative of Panasonic was the “separate source” who

25 ² This exchange itself provides evidence that Philips could have exchanged price and production
26 information regarding TFT-LCD panels for the same time period as Epson produced such panels.
27 Although Defendants point out testimony that Epson did not produce such panels in fall 2004
(*see* Dkt. # 696 at 22 (citing Trial Tr. Oct. 8, 2014 [Takato Imai Test.] 1942:3-19, 1943:1-12)),
this email reflects Philips’ information for winter 2004-2005 and spring 2005.

1 provided this information. *See id.* This evidence amply supports the jury's finding that
2 Panasonic was a conspirator.

3 Because the jury could have reasonably found that Philips and Panasonic were
4 conspirators based on this evidence, the Court need not address Plaintiff's alternative
5 theory based on Philips and Panasonic's ownership/control relationship of other
6 conspirators.

7 f. Motion to Amend the Court's Findings of Fact and Conclusions of Law

8 The final portion of Defendants' Motion is their request that the Court amend its
9 Findings of Fact and Conclusions of Law. *See* Dkt. # 689 at 33. Such motions are
10 typically only granted "to correct manifest errors of law or fact or to address newly
11 discovered evidence or controlling case law." *Perez*, 291 F.R.D. at 431.

12 Defendants first contend that the Court should amend its conclusion that wholly
13 owned subsidiaries of conspirators or conspirators' subsidiaries were "controlled by
14 members of a subsidiary." *See* Dkt. # 689 at 34 (quoting Dkt. # 681 at 11). Defendants
15 aver that the Court applied the incorrect legal test in reaching this conclusion; rather, they
16 contend that the proper test was expounded by *In re Vitamin C Antitrust Litig.*, 279
17 F.R.D. 90, 101 (E.D.N.Y. 2012). *See id.* Of course, *Vitamin C* is not binding on this
18 Court and Defendants did not previously raise this argument with this Court, meaning
19 that they are barred from raising it on this Motion. *See Diocese of Winona v. Interstate*
20 *Fire & Cas. Co.*, 89 F.3d 1386, 1397 (8th Cir. 1996) (citing *Concordia College Corp. v.*
21 *W.R. Grace & Co.*, 999 F.2d 326, 330 (8th Cir. 1993)) ("Motions to amend a judgment
22 cannot be used to raise arguments which could have been raised prior to the issuance of
23 judgment").

24 Furthermore, to the extent that *Vitamin C* holds that a parent-subsidiary
25 relationship standing alone may not satisfy the ownership/control exception (*see Vitamin*
26 *C*, 279 F.R.D. at 101-02), that is not the law of this circuit. The Ninth Circuit held in
27 *ATM Fee* that control may exist through either majority ownership of stock *or* actual
28

1 control over a corporation's conduct. *See* 686 F.3d at 757 (citing *Weinstein Enters., Inc.*
2 *v. Orloff*, 870 A.2d 499, 506-08 (Del. 2005); *Kaplan v. Centex Corp.*, 284 A.2d 119,
3 1220-23 (Del. Ch. 1971)) (analogizing necessary control for application of
4 ownership/control exception to rules governing shareholder duties). Defendants have not
5 identified any error to justify the Court's amendment of its findings.

6 Defendants next contend that the Court incorrectly found that Panasonic controlled
7 JVC after Panasonic's equity ownership declined to less than a majority. *See* Dkt. # 689
8 at 35-37. However, the Court also found that there was no realistic possibility that JVC
9 would have sued prior to July 2007 because it was under the control of Panasonic for the
10 duration of the conspiracy. *See* Dkt. # 681 at 11-12. Furthermore, this Court does not
11 believe that *ATM Fee* created a rule categorically precluding standing when a conspirator
12 has less than a majority interest in the direct purchaser. To the contrary, as the MDL
13 Court noted, "the fact that a company's shareholder interest is less than 50% and/or its
14 representation on the board of directors of another company is less than 50% does not
15 necessarily preclude control." MDL Dkt. # 7422 at 5-6. In addition, this Court rejected
16 the Defendants' proposed date-of-suit rule (*see* Dkt. # 558), meaning that the Court's
17 conclusion that there was no realistic possibility JVC would have sued prior to July 2007
18 sufficiently establishes Plaintiff's right to recover for its purchases from JVC.

19 **V. CONCLUSION**

20 For the reasons stated above, the Court **DENIES** Defendants' Motions for
21 Judgment as a Matter of Law, in the Alternative, New Trial, and Amendment of the
22 Findings in Bench Trial. Dkt. # 689.

23 DATED this 3rd day of March, 2016.

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The Honorable Richard A. Jones
United States District Court